No. 93-1619

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In The

Supreme Court of the United States

October Term, 1993

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Petitioners,

vs.

GOTHAM TOWER, INC., BELL BROADCASTING COMPANY, MARLIN BROADCASTING COMPANY and VIACOM INTERNATIONAL, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS BELL BROADCASTING COMPANY AND MARLIN BROADCASTING COMPANY

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QUESTION PRESENTED FOR REVIEW

Whether this Court should deny certiorari to the United States Court of Appeals for the Sixth Circuit, which ruled that the Federal Communications Act preempts petitioners' common law nuisance claim that respondents' radio broadcast signals interfere with petitioners' radio and television reception and with the operation of electronic equipment in petitioners' homes, where: (1) the Sixth Circuit did not decide a federal question in a way that conflicts with applicable decisions of this Court, (2) the decision of the Sixth Circuit is not in conflict with any decision of a United States Court of Appeals, and (3) the decision of the Sixth Circuit is in accord with the one other federal court and all state court decisions on the same issue?

STATEMENT PURSUANT TO RULE 29.1

There are no parent companies or subsidiaries (excluding wholly owned subsidiaries) of either Bell Broadcasting Company or Marlin Broadcasting Company.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit (Pet. App. i) is reported at 13 F.3d 994 (6th Cir. 1994). The opinion of the United States District Court for the Eastern District of Michigan (Pet. Supp. App.) is unreported.

STATEMENT OF THE CASE

Respondents are three FCC-licensed FM radio broadcasters (Bell Broadcasting Company, Marlin Broadcasting Company and Viacom International, Inc.), all located at and transmitting from a tower owned and operated by respondent Gotham Tower, Inc. Federal Communications Commission ("F.C.C.") licenses regulate the frequency, power and location of respondents' signals. 47 U.S.C. § 303.

Petitioners' complaint, filed in state court, alleged that respondents' transmission of FM radio signals constitutes a common law nuisance because the radio signals interfere with radio and television reception in petitioners' homes and with the operation of home electronic equipment such as telephones, garage door openers and VCR's. (Complaint, R. 1, ¶¶ 9, 10.) According to petitioners, respondents transmit FM radio signals that "regularly exceed the federal standard for FM blanketing interference or [are] otherwise excessively intense.[1] (*Id.*,

[1] "FM Blanketing" is defined in 47 C.F.R. § 73.310 as: [T]hat form of interference to the reception of other broadcast stations which is caused by the presence of

¶ 9.) Petitioners sought monetary damages and equitable relief. (*Id.*, Count I, p. 4; Count II, p. 5.)

Respondents removed the action to the United States District Court for the Eastern District of Michigan and moved to dismiss for failure to state a claim upon which relief can be granted. The district court granted respondents' motion to dismiss on the ground that petitioners' action is preempted by the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613. (Pet. Supp. App., pp. 8-9.) The United States Court of Appeals for the Sixth Circuit affirmed. It noted, however, that petitioners may pursue their claims for radio frequency interference with the F.C.C. (Pet. App. i, p. 6.)

As required by Rule 15.1 of this Court, respondents point out the following misstatement of fact appearing in the petition. The petition asserts at Pet., pp. 14, 21, that the F.C.C. made certain representations to petitioners; at Pet. App., p. ii[sic], petitioners attach a hearsay affidavit which purports to attest to the fact and substance of such communication. Neither the statement nor the affidavit was part of petitioners' complaint, neither was considered by the district court or Court of Appeals in deciding or reviewing the decision on respondents' 12(b)(6) motion, *see* Pet. App. i, *and* Pet. Supp. App., and neither is properly before this Court.

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an FM broadcast signal of 115 dBu (562 mV/m) or greater signal strength in the area adjacent to the antenna of the transmitting station. The 115 dBu contour is referred to as the blanketing contour and the area within this contour is referred to as the blanketing area.

Pursuant to Rule 15.1, respondents further point out the petition's following misstatements of law. The petition asserts, at Pet., p. 21, that:

> [T]he Federal Regulations only address problems where FM stations' signals interfere with the reception of signals broadcast by other FM stations. There is no federal regulation of interference by FM signals with anything else.

The petition also sets out the text of the introductory paragraph of 47 C.F.R. § 73.318. (Pet., pp. 10-11.)

Subsections (b), (c) and (d) of 47 C.F.R. § 73.318, which the petition does not cite, regulate interference by FM signals with residential radio and television receivers. *See In re Application of Calvary Educ. Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992).

SUMMARY OF ARGUMENT

Although petitioners claim to seek review for two of the reasons under Rule 10.1 (Pet., p. 6), the petition does not support either one. The first ground claimed is that the decision below "conflicts with applicable 47 U.S.C. § 414 decisions of the Supreme Court. . . . " Yet, the petition cites no such Supreme Court decisions. There is no such conflict.

The second ground claimed is that the decision below "is in conflict with the decisions of other United States Courts of Appeals on the same matter." Again, the petition nowhere cites any such decisions. There is no such conflict. There are only four decisions "on the same matter" as petitioners' "Question Presented for Review," one

by a federal district court and three by state appellate courts. All are in accord with and cited in the decision below; none is cited in the petition.

What the petition really argues are the merits of petitioners' case – why they believe their state law nuisance claim about radio frequency interference is not preempted by the Federal Communications Act. Nowhere does the petition suggest any reason why this Court should consider the matter. Moreover, each of petitioners' arguments on the merits is answered cogently and correctly by the lower court decision.

REASONS FOR DENYING THE PETITION

I. NEITHER OF THE PURPORTED "CONFLICTS" CLAIMED AS REASONS FOR SEEKING REVIEW IS SUPPORTED BY THE PETITION.

A. The Petition Cites No "47 U.S.C. § 414 Decisions Of The Supreme Court," Much Less Any Which Conflict With The Decision Below.

Petitioners' first stated ground for review by this Court is that the decision below "decided a federal question in a way that conflicts with applicable 47 U.S.C. § 414 decisions of the Supreme Court. . . . " (Pet., p. 6.) The petition, however, does not cite or identify a single decision of this Court as a "47 U.S.C. § 414 decision."

Section 414 of the Federal Communications Act (Pet., p. 11), the statute's "savings clause," appears to have been cited by this Court in only two opinions, neither of which is cited in the petition or is in conflict with the

lower court decision. In *Teleprompter Corp. v. Columbia Broadcasting System*, 415 U.S. 394 (1974), an action by owners of copyrighted television programs for copyright infringement, there was no preemption claim. The Court merely recognized in a footnote that the F.C.C.'s position that it is without power to alter rights emanating from sources, including the Copyright Act, other than the Federal Communications Act, is consistent with the language of § 414. *Id.*, at 406 n.11.

In *Head v. New Mexico Bd. of Examiners In Optometry*, 374 U.S. 424, 443-44 (1963), relied on by the court below for the proposition that this Court recognizes that "the FCC's jurisdiction 'over technical matters' associated with the transmission of radio signals 'is clearly exclusive' " (Pet. App. i, p. 5, *citing* 374 U.S. 424, 430 n.6), the concurring opinion cites § 414.

The decisions of this Court upon which petitioners do rely present no conflict, either. Neither *Cippolone v. Liggett Group, Inc.*, 505 U.S. ___, 112 S. Ct. 2608 (1992), which was fully considered by the Circuit Court below (Pet. App. i, pp. 4-5), nor *Papas v. Zoecon Corp.*, ___ U.S. ___, 112 S. Ct. 3020 (1992), nor *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), nor *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), nor *Tennessee Valley Auth. v. Hill*, 437 U.S. 153 (1978), nor *West Virginia Univ. Hosp. Inc. v. Casey*, 499 U.S. 83 (1991) interprets or involves 47 U.S.C. § 414.[2]

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[2] The one Court of Appeals opinion cited by petitioners which discusses 47 U.S.C. § 414, *Comtronics, Inc. v. Puerto Rico Tel. Co.*, 553 F.2d 701, 708 (1st Cir. 1977), is not in conflict with the decision below, either. The *Comtronics* court's holding *affirming dismissal* of a damages action against a telephone company which refused to connect the plaintiff's equipment to

The claimed conflict between the decision below and "applicable 47 U.S.C. § 414 decisions of the Supreme Court" does not exist.

B. The Petition Cites No United States Court Of Appeals Decisions Which Conflict With The Decision Below, Which Decision Is In Accord With Decisions Of Other Courts On The Same Issue.

Although petitioners' second stated ground for review is that the decision by the Sixth Circuit "is in

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the company's lines did not involve an analysis of § 414. Instead, it was based upon "a clear legislative intent to preclude such a remedy," 553 F.2d 705, and on the fact that "*Congress has subjected [the defendant's] actions as a carrier to the detailed regulatory scheme of the Communications Act.*" *Id.*, at 207 (emphasis added). The court expressed its view of § 414 in a footnote, only a portion of a sentence of which is quoted in the petition. Correctly quoted, as follows, the *Comtronics* court supports the Sixth Circuit's reasoning in holding petitioners' action involving radio frequency interference preempted:

> [W]e read § 414 as preserving causes of action for breaches of duties distinguishable from those created under the Act, *as in the case of a contract claim.*

553 F.2d at 708 (emphasis added). In contrast to the hypothetical breach of contract claim which the *Comtronics* court would allow, the complaint below did allege a breach of duty created under the Federal Communications Act. Petitioners' claim would impose liability for:

> radio frequency radiation . . . at high levels of intensity which regularly exceed the federal standard for FM blanketing interference.

(Complaint, R. 1, ¶ 9.) That is, the complaint alleged actions by the respondent broadcasters which Congress has subjected to "the detailed regulatory scheme of the Communications Act." *Comtronics, Inc.*, 553 F.2d at 207.

conflict with the decisions of other United States Courts of Appeals on the same matter" (Pet., p. 6), petitioners do not cite a single United States Court of Appeals decision allowing a private nuisance claim for radio signal interference. Nor has any such decision come to the attention of respondents. Instead, as the decision below observed, "*all courts* that have considered the interaction of common law nuisance claims and the Federal Communications Act" (Pet. App. i, p. 3, emphasis added) have made a "consistent finding of preemption." (*Id.*) The decisions of those courts are cited in the opinion below (Pet. App. i, p. 3) and include the only federal decision which considers a claim like that of petitioners, *Still v. Michaels*, 791 F. Supp. 284 (D. Ariz. 1992) (common law nuisance claims based on radio frequency interference are preempted by the Federal Communications Act), and decisions from three state appellate courts: *Still v. Michaels*, 803 P.2d 124 (Ariz. 1990) (the F.C.C. has exclusive jurisdiction over resolution of radio signal interference nuisance claims); *Smith v. Calvary Educ. Broadcasting Network*, 783 S.W.2d 533 (Mo. App. 1990) (the Federal Communications Act preempts a state nuisance action based on radio signal interference with electrical appliances); and *Blackburn v. Doubleday Broadcasting Co.*, 353 N.W.2d 550 (Minn. 1984) (radio transmission nuisance claims are under the exclusive jurisdiction of the F.C.C.).

Petitioners' claimed conflict between the decision below and a decision of a Court of Appeals – or any court – on the same matter does not exist.

II. THE PETITION MERELY REITERATES PETITIONERS' ARGUMENTS ON THE MERITS OF THEIR CASE, WHICH THE COURT BELOW COGENTLY AND CORRECTLY REJECTED.

Instead of attempting to demonstrate that there are "special and important reasons," Rule 10.1, for granting the petition, petitioners' argument presents the reasons why they believe the Federal Communications Act does not preempt their state law action to have respondents' transmission of FM radio signals declared a nuisance and to enjoin the alleged nuisance and be awarded damages therefor. When petitioners made the same argument to the lower court, it was correctly rejected.

In a soundly reasoned opinion, the lower court accepted petitioners' contention that this Court's opinion in *Cipollone, supra,* reaffirms the presumption against federal preemption of state law and acknowledged *Cipollone*'s emphasis on strict adherence to the scope of specific preemption provisions in legislation. (Pet. App. i, p. 4.) Unlike petitioners, however, the court below followed the further teaching of *Cipollone* that absent a specific preemption provision, it should turn to an implied preemption analysis, which required it:

> to determine whether [petitioners'] state law nuisance action actually conflicts with the Act or if [petitioners'] claim is necessarily displaced because the Act fully occupies the field.

(*Id.*, p. 5.) The Sixth Circuit concluded that, because there is an "irreconcilable conflict between the FCC's exercise of exclusive jurisdiction over the regulation of radio frequency interference and the imposition of common law

standards in a damage action," petitioners' action is preempted. (*Id.*)

The court below even addressed petitioners' concerns that if their nuisance action is preempted, they will lack a forum. The Sixth Circuit cited an F.C.C. decision, *In re Application of Calvary Educ. Broadcasting Network, Inc.*, 7 F.C.C.R. 4037 (1992), which illustrates for petitioners the appropriate procedure and remedies available for redressing their complaints about radio frequency interference through the F.C.C. and the FM Branch of the Mass Media Bureau. (Pet. App. i, pp. 6-7.)

The petition fails to identify any error in the lower court decision, just as it fails to show any reason why the decision should be reviewed by this Court.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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